Irish International University v New Straits Times Press (M) Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S-23–50 OF 2006
BALIA YUSOF J
22 FEBRUARY 2011

Tort — Defamation — Libel — Publication of article in local newspaper — Whether impugned article implicated plaintiff — Whether impugned words calculated to disparage plaintiff — Whether defendants liable for damages — Defences — Justification, fair comment and qualified privilege — Whether available — Whether statements complained of proven to be substantially true in substance and fact

The plaintiff's claim was for defamation arising out of an article entitled 'Degrees from dubious universities under probe' published in the *New Straits Times* on 19 July 2005. The plaintiff was claiming for an unspecified amount of damages against the defendants. The offending paragraphs in the said publication, inter alia, were as follows: '(i) several hundred Malaysians may be holding questionable qualification from two unaccredited universities; (ii) …Degrees from Cambridgeshire University and Irish International University are not accredited or recognised in the UK, US and Ireland; (iii) …The Higher Education Ministry is now looking into claims that the institutions are bogus, ….' The plaintiff contended that the article published by the defendants was maliciously fabricated and untrue, resulting in the plaintiff being damaged in its credibility and reputation as an international organisation. The issues raised for the consideration of this court, inter alia, were as follows: (i) whether the words published by the defendants were defamatory, and (ii) whether any of the defences of justification, fair comment and qualified privilege were available.

Held, dismissing the plaintiff's claim with costs:

(1) The article in its totality was defamatory and it no doubt referred to the plaintiff. However, the defendants had successfully raised the defence of justification. In other words, what had been published by the defendants was true, based on the established facts, inter alia, that the degrees awarded by the plaintiff were not accredited or recognised by the Department for Education and Skills in the United Kingdom, the government of the Republic of Ireland and any government sanctioned body in the United States of America. In fact, the Embassy of the Republic of Ireland in Malaysia had communicated with the Ministry of

Higher Education in Malaysia to express their concern about the plaintiff's bona fides in offering courses in Malaysia under the name 'The Irish International University'. Further, at the time of the publication of the article, the plaintiff's degree and/or diplomas were not accredited or recognised by the Public Service Department in Malaysia (see paras 13–14 & 36).

(2) The defence of qualified privilege was also available and applicable to the facts of this case. The defendants had satisfied the test as stated in the case of *Reynolds v Times Newspapers Ltd and others* [1998] 3 WLR 863. Being a national newspaper, the defendants have the moral and social obligation to inform the public. At the same time, the subject matter here being education, was certainly a matter of public importance and an issue of public interest. The defendants had the moral and social obligation to publish the report. Any citizen who believes that wrong has been done, has a right and duty to remove, punish or reprimand the offender, or merely to inquire into the subject matter of the complaint (see para 17).

(3) As to the issue of malice on the part of the defendants, the plaintiff had failed to comply with O 78 r 3 of the Rules of the High Court 1980. Due to the failure of replying to the defence filed by the defendant, the plaintiff could not plead malice by way of evidence. Hence, in the absence of malice, the defence of qualified privilege therefore applies and the defendants are entitled to rely on the defence (see paras 22, 24 & 31).

(4) The article was not really a comment but rather a presentation of the facts on the subject matter and thus the expression of opinion that the degrees from the plaintiff's university was dubious and the qualifications were questionable, was a fair comment on a matter of public interest. It was a publication of some facts which were supported by evidence, both oral and documentary which was indeed the truth (see para 35).

[Bahasa Malaysia summary

Tuntutan plaintif di sini adalah untuk fitnah akibat daripada satu artikel bertajuk 'Degrees from dubious universities under probe' yang diterbitkan di dalam akhbar *The New Straits Times* pada 19 Julai 2005. Plaintif menuntut sejumlah ganti rugi yang tidak dinyatakan terhadap defendan-defendan. Perenggan yang menyinggung di dalam terbitan tersebut, antara lain, adalah seperti berikut: '(i) several hundred Malaysians may be holding questionable qualification from two unaccredited universities; (ii) … Degrees from Cambridgeshire University and Irish International University are not accredited or recognised in the UK, US and Ireland; (iii) … The Higher Education Ministry is now looking into claims that the institutions are bogus, ….' Plaintif menghujah bahawa artikel yang diterbitkan oleh defendan-defendan telah direka dengan niat jahat dan tidak benar, menyebabkan plaintif merosakkan kebolehpercayaan dan reputasinya sebagai

organisasi antarabangsa. Isu-isu yang dibangkitkan untuk pertimbangan mahkamah ini, antara lain, adalah seperti berikut: (i) sama ada perkataan-perkataan yang diterbitkan oleh defendan-defendan adalah fitnah; (ii) sama ada terdapat apa-apa pembelaan justifikasi, ulasan saksama dan keistimewaan bersyarat.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Artikel ini secara keseluruhannya adalah fitnah dan tidak ada keraguan bahawa ia merujuk kepada plaintif. Walau bagaimanapun, defendan-defendan telah berjaya membangkitkan pembelaan justifikasi. Dalam perkataan lain, apa yang diterbitkan oleh defendan-defendan adalah benar, berdasarkan kepada fakta-fakta yang mantap, antara lain, bahawa ijazah yang diberikan oleh plaintif tidak dikreditasi atau diakui oleh Department of Education and Skills di United Kingdom, kerajaan Republic Ireland dan badan lain yang diberikan sanksi oleh kerajaan di Amerika Syarikat. Sebenarnya, Kedutaan Republik Ireland di Malaysia telah berkomunikasi dengan Kementerian Pendidikan Tinggi di Malaysia untuk menyatakan kekhuatiran mereka tentang kejujuran plaintif dalam menawarkan kursus di Malaysia di bawah nama 'The Irish International University'. Selanjutnya, pada masa penerbitan artikel tersebut, ijazah dan/atau diploma plaintif tidak dikreditasikan atau diakui oleh Jabatan Perkhidmatan Awam di Malaysia (lihat perenggan 13–14 & 36).

(2) Pembelaan keistimewaan bersyarat juga terdapat dan beraplikasi kepada fakta-fakta kes ini. Defendan-defendan telah memenuhi ujian seperti yang dinyatakan di dalam kes *Reynolds v Times Newspapers Ltd and others* [1998] 3 WLR 863. Sebagai akhbar nasional, defendan-defendan mempunyai kewajipan moral dan sosial untuk memberitahu umum. Pada masa yang sama, subjek perkara di sini adalah pendidikan, yang sememangnya satu perkara yang mempunyai kepentingan awam dan satu isu kepentingan awam. Defendan-defendan mempunyai kewajipan moral dan sosial untuk menerbitkan laporan tersebut. Mana-mana warganegara yang percaya bahawa kesalahan telah dilakukan, mempunyai hak dan kewajipan untuk membuang, menghukum atau menegur pelaku salah tersebut, atau semata-mata untuk menanya dalam subjek perkara aduan tersebut (lihat perenggan 17).

(3) Mengenai isu niat jahat pada pihak defendan-defendan, plaintif telah gagal untuk mematuhi A 78 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980. Disebabkan oleh kegagalan memfailkan jawapan untuk pembelaan oleh defendan, plaintif tidak boleh merayu niat jahat secara keterangan. Maka, dengan ketiadaan niat jahat, pembelaan

keistimewaan bersyarat oleh itu beraplikasi dan defendan-defendan berhak untuk bergantung pada pembelaan tersebut (lihat perenggan 22, 24 & 31).

(4) Artikel tersebut bukan sebenarnya suatu komen tetapi satu pengemukaan fakta-fakta atas subjek perkara dan oleh itu penyataan pendapat bahawa ijazah daripada universiti plaintif adalah diragui dan kelayakannya boleh dipersoalkan, adalah komen yang adil atas perkara kepentingan awam. Ia adalah penerbitan beberapa fakta yang disokong oleh keterangan, kedua-dua lisan dan dokumentar yang sebenarnya benar (lihat perenggan 35).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 369–527.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142 (refd)

Adam v Ward [1917] AC 309, HL (refd)

Badrul Zaman bin PS Md Zakariah v Jabatan Penyiaran Radio dan Televisyen Malaysia & Ors and other cases [2009] 7 CLJ 285, HC (refd)

Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad [1999] 4 MLJ 58, HC (refd)

Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3) [2005] 5 MLJ 561, HC (refd)

Datuk Harris Mohd Salleh v Datuk Mohd Shafie Hj Adpal & Ors [2009] 7 MLJ 371; [2009] 2 CLJ 682, HC (refd)

Halim bin Arsyat v Sistem Televisyen Malaysia Bhd & Ors [2001] 6 MLJ 353, HC (refd)

Hoe Thean Sun & Anor v Lim Tee Keng [1999] 3 MLJ 138; [1999] 1 CLJ 187, HC (refd)

John Lee & Anor v Henry Wong Jan Fook [1981] 1 MLJ 108; [1980] 1 LNS 190, FC (refd)

Kian Lup Construction v HongKong Bank Malaysia Bhd [2002] 7 MLJ 283; [2002] 7 CLJ 32, HC (refd)

M Prabhkaran v Salam bin Seran [2001] 6 MLJ 368, HC (refd)

Reynolds v Times Newspapers Ltd and others [1998] 3 WLR 863, CA (folld)

Tan Seng Hin v Editor of 'See Hua Daily News' & Anor [2008] 8 MLJ 73; [2009] 7 CLJ 265, HC (refd)

Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393; [1995] 1 LNS 304, HC (refd)

Legislation referred to

Companies Act 1965 s 332(1)

Rules of the High Court 1980 O 44 r 3(3), O 78 r 3, 3(3)

Paramjit Kaur (Mann & Associates) for the plaintiff.
N Segaran (Soo Siew Mei with him) (Shearn Delamore & Co) for the defendants.

Balia Yusof J:

[1] The plaintiff's claim is for defamation arising out of an article published in the *New Straits Times* on 19 July 2005 and is claiming for an unspecified amount of damages against the defendants. At the outset I must also mention that the plaintiff has dropped its prayer for injunction and for special damages in the sum of RM82,000 but maintains its claim for aggravated, exemplary and punitive damages, interests and costs.

[2] The only issue to be tried in this case has been agreed by the parties, and it is simply whether the words published by the defendants on 19 July 2005 are defamatory and secondly whether any of the defences raised by the defendants is available. The defendants are pleading all the defences of justification, fair comment and qualified privilege. Another issue raised is whether the plaintiff is a legal entity and capable of bringing the suit against the defendants in this case. There are altogether eight paragraphs in the said article which the plaintiff claims to be defamatory which is produced in *lampiran* 17, the agreed bundle of documents.

[3] The offending paragraphs in the said publication are as follows:

Degrees from dubious universities under probe.

(i) several hundred Malaysians may be holding questionable qualification from two unaccredited universities;

(ii) … Degrees from Cambridgeshire University and Irish International University are not accredited or recognised in the UK, US and Ireland;

(iii) … The Higher Education Ministry is now looking into claims that the institutions are bogus, …;

(iv) … she (Yap Yee Lan) alleged that after a year of classes in MBA programme of the International Irish University, she and her classmates were abruptly asked to transfer to the programme of Cambridge University;

(v) … she (Yap Yee Lan) then did some research and discovered the universities were apparently unaccredited and unrecognised here;

(vi) … an Irish embassy staff member said many queries had been received about the International Irish University;

(vii) … the staff member said the university's connection with Ireland was without substance and the embassy had taken its concern to the Higher Education Ministry in the past;

(viii) … Public Service Department accreditation unit officer Ross Rafizal Rosli also confirmed the two were not on its list of recognised universities and qualifications.

[4] The plaintiff's first witness, the Ketua Pengarah Unit Pengiktirafan Kelayakan, Jabatan Perkhidmatan Awam gave evidence that by a letter dated 13 December 1999, the department wrote to one Professor Dr Sandhu, Executive Director International Postgraduate Facilitator Management Centre, Kuching Sarawak stating that Master of Business Administration and Doctor of Philosophy degrees from the Irish International University, Republic of Ireland, 'Diiktiraf oleh kerajaan dengan syarat memiliki Ijazah Pertama yang diiktiraf'. This is the only evidence of this witness.

[5] Upon being cross-examined on the said letter, he admits that he does not know who the addressee was and unable to give any details or background to the said letter. On the issue of whether the Irish International University is recognised by the government, he was unable to answer but confirm that the said university is not listed in the list of approved universities maintained by the Jabatan Perkhidmatan Awam. He maintains that the recognition mentioned in the said letter which is produced at p 52 of the agreed bundle of documents is only a recognition for the purpose of admission to the public service. To a question posed by the court, this witness stated that the plaintiff is not recognised by the government.

[6] PW2, the executive president of the plaintiff stated that the plaintiff started operation in the year 2000 for off campus and 2001 for in campus programme. The plaintiff was incorporated in the Republic of Ireland as shown by the document at pp 48–49 of the agreed bundle of documents. Its operation in Malaysia is for off campus programme and he refers to pp 50–51 of the agreed bundle of documents as proof of its registration in Malaysia and further refers to the letter at p 52 dated 13 December 1999 as the letter of recognition by the Malaysian Government. He goes on to state that the article published by the defendants was maliciously fabricated and untrue, resulting in the plaintiff being damaged in its credibility and reputation as an international organisation. He claims the plaintiff has suffered damages estimated in the sum of RM50m.

[7] For the defendants, DW2 testified that she registered for a course with NetAcademy and NetAcademy was the provider for the degree on behalf of the Irish International University. After a year, her classes were abruptly terminated and transferred to another programme. She then did some research and discovered the universities were apparently unaccredited and unrecognised. She has written to many parties and having obtained some documents, she then passed them on to DW1 who then wrote the impugned article.

[8] The evidence of DW1, the journalist who was in the employment of the defendants in question and answer No 5 of her witness statement she states that the basis upon which the article was written were based on her meeting with DW2 and after receiving documents and after having interviewed a staff from the Irish Embassy. She has also written to the British Council and having received documents which were supplied to her by DW2. DW1 has also called the Public Service Department and the Private Education Division to check on the status of the two universities. She in particular spoke to two officers by the name of Mohd Azman Mohd Nowawi and Ross Rafizal Rosli. Both these officers confirmed that the courses of the two universities were not accredited or recognised.

[9] Page 89 of the agreed bundle of documents is a letter from the Jabatan Perkhidmatan Awam Malaysia dated 26 April 2005. Paragraph 3 of the same states that: 'Kelayakan Irish International University dan Cambridgeshire University adalah tidak tersenarai di dalam Senarai Kelayakan Yang diiktiraf oleh Kerajaan bagi maksud lantikan ke dalam Perkhidmatan Awam.'

[10] Learned counsel for the plaintiff takes issue with this because in so far as that recognition is concerned it merely says that it is not recognised for purposes of for entry into the public service. I agree with her submission that it is a partial recognition because it is only not recognised for purposes of entering into the public service.

[11] Next, there is the report at pp 104–107 of the agreed bundle of document titled 'Report On The So Called Irish International University of Europe and Cambridgeshire University'. Paragraphs 8–10 of the said report state as follows:

> 8. The Ministry of Higher Education would like to emphasise that both so called 'universities' claim to provide programmes by open and/or e-learning. This mode of delivery is very vulnerable to exploitation, fraud and abuse by unscrupulous operators and disreputable providers who run diploma mills and accreditation factories churning out bogus degrees. Parents and students always check the authenticity of on-line or e-learning providers.
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> 9. The Ministry of Higher Education will also consider both 'universities' as bogus. It has not been established that these institutions are bona fide educational providers that have legal authority to grant degrees and have clearly identified officials who are accountable for the services provided as well as the quality of the qualifications awarded and that these qualifications have been independently quality assured by a reputable quality assurance or accreditation agency. Incorporation by itself does not provide legal authority to grant degrees. A legal business that calls itself a College or University does not have legal Degree Granting Authority unless such Authority is secured in the proper jurisdiction.

10. Even if a College or University is legally incorporated in another country it cannot offer courses in Malaysia unless it has been legally incorporated and approved to conduct courses by LAN. If it grants degrees, it is considered fraud and illegal and action can be taken against it.

[12] It is to be noted however, that this report was prepared and published after the impugned article by the defendants were published on 19 July 2005.

[13] Having considered the evidence of the witnesses and having perused the exhibits, the various documents which are all agreed documents in this case, the court finds that the article in its totality are defamatory and it no doubt refers to the plaintiff. Since publication has been admitted and agreed by the parties, the court now shall consider whether any of the defences is available to the defendants.

[14] It is the court's finding that the defendants have successfully raised the defence of justification. In other words what has been published by the defendants are true. Having considered the facts and circumstances as well as the evidence of the parties, the court agrees with the submissions of learned counsel for the defendants that the words complained of by the plaintiff in this article are true based on the following facts established by the evidence tendered:

(a) Degrees awarded by the plaintiff are not accredited or recognised by the Department for Education and Skills in the United Kingdom, the government of the Republic of Ireland and any government sanctioned body in the United States of America.

(b) The Embassy of the Republic of Ireland in Malaysia have communicated with Ministry of Higher Education in Malaysia to express their concerns about the plaintiff's bona fides in offering courses in Malaysia under the name 'The Irish International University'.

(c) The plaintiff's degree and/or diplomas are, as at the time of the publication of the article, not accredited or recognised by the Public Service Department in Malaysia.

(d) DW2, a student at NetAcademy Sdn Bhd had lodged a police report against NetAcademy Sdn Bhd where she alleged that NetAcademy Sdn Bhd had offered a course 'Master in Business Administration' from universities such as the 'Irish International University'.

(e) Subsequently, DW2 was asked to transfer as an MBA student of the Plaintiffs to another MBA course run by Cambridge University.

(f) Upon realizing that the plaintiff was not offering courses accredited and recognised by the Public Service Department Malaysia, the British Council, MACEE and the Embassy of Ireland, DW2 demanded a refund of the fees paid by her to NetAcademy Sdn Bhd.

(g) DW2 succeeded in her claim before the consumer claims tribunal.

(h) The Ambassador of the Republic of Ireland to Malaysia at the material time, had confirmed that the plaintiff had no ties with the Republic of Ireland and that the Irish authorities were investigating the plaintiff institution.

[15] In the case of *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393; [1995] 1 LNS 304 His Lordship Richard Malanjum J (as he then was) on the issue of the defence of justification at p 494 said:

> In a defamation action, the defence of justification is a complete defence if it succeeds. And the question of malice or bad faith does not arise. But in order to succeed in the defence of justification a defendant must establish the truth of all the material statement in the words complained of which may include defamatory comments made therein. And in order to justify such comments, it is necessary to show that the comments are the correct imputations or conclusions to be drawn from the proved facts. However, the plea of justification does not fail 'by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to be truth of the remaining charges'.

[16] And in *Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad* [1999] 4 MLJ 58 it was held that:

> … what is true, cannot be defamatory … on the grounds of public policy the exposure of truth must be paramount when compared to that of reputation… there can be no room even for malice if the matter published is found to be true.

[17] On the defence of qualified privilege, having considered the evidence in its totality, the fact and circumstances, I am of the view that the defence of qualified privilege is also available and applicable to the facts of this case. It is my finding that the defendants have satisfied the test as stated in the case of *Reynolds v Times Newspapers Ltd and others* [1998] 3 WLR 863 which among others require that the court must consider the seriousness of the allegations and the nature of the information, the source of the information, the steps taken to verify the information before the publication of the information, the status of the information and on the subject matter itself. It is my finding that being a national newspaper, the defendants have the moral and social obligation to inform the public. At the same time, the subject matter here being education, is certainly a matter of public importance and an issue of public interest. The defendants have the moral and social obligation to publish the report. Any citizen who bona fide believes that wrong has been done has a right and duty to remove, punish or reprimand the offender, or merely to inquire into the subject matter of the complaint (see *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142). Where a statement made by a person

having a legal duty to make it and the recipient has a corresponding interest or duty to receive it, such communication is privilege (see *John Lee & Anor v Henry Wong Jan Fook* [1981] 1 MLJ 108; [1980] 1 LNS 190, *Adam v Ward* [1917] AC 309).

[18] In *Datuk Harris Mohd Salleh v Datuk Mohd Shafie Hj Adpal & Ors* [2009] 7 MLJ 371 at p 386; [2009] 2 CLJ 682 at p 697, the court states:

> In the instant case the defendants are news publishers. Their rights, privileges, immunities are quite different from any commercial organisations or private persons. Newspapers are ordinarily expected to report contemporary events of public interest or public concern which is often liberally construed by the courts. In this context, news is defined by *The Concise Oxford Dictionary* as information about important or interesting recent events. This is to say, in our context what the newsman sees or hears from the original source in relation to the publication. The truth per se is not material but the fact that such things were said in appropriate occasions by the maker may give the news media the right to publish the same.

[19] See also (*Tan Seng Hin v Editor of 'See Hua Daily News' & Anor* [2008] 8 MLJ 73; [2009] 7 CLJ 265, *Badrul Zaman bin PS Md Zakariah v Jabatan Penyiaran Radio dan Televisyen Malaysia & Ors and other cases* [2009] 7 CLJ 285).

[20] From the evidence given by DW1 and in particular Q & A No 5 of her witness statement in respect of the status and source of the material and the steps taken by her to verify the information before its publication, this court is satisfied that the test as formulated in the *Reynolds's* case has been met.

[21] In the said Q & A No 5 of the witness statement, DW1 has listed out the various documents that were made available to her in respect of her 'investigation' on the plaintiff which started when DW2 filed her complaint in the consumer claims tribunal concerning the plaintiff. In coming out with the impugned article in the defendants' newspaper, she had also obtained materials from the Irish Embassy. This is coupled with the fact of materials given to her by DW2 who has done quite an extensive research on the plaintiff's status.

[22] As to the issue of malice on the part of the defendants, I am in agreement with the submissions of learned counsel for the defendants that O 78 r 3 of the Rules of the High Court 1980 has not been complied with.

[23] Order 78 r 3(3) of the Rules of the High Court 1980 reads:

> Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the

allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.

[24] In the present proceeding, it is pertinent to note that there was no reply to the defence filed by the plaintiff and therefore the plaintiff cannot plead malice by way of evidence.

[25] In *Halim bin Arsyat v Sistem Televisyen Malaysia Bhd & Ors* [2001] 6 MLJ 353, it was held at head note [3] that:

[3] Once this defence (qualified privilege) is made out, it could be defeated only by proof of express malice by virtue of O 78 r 3(3) of the Rules of the High Court 1980. Express malice must be pleaded in a reply and that particulars must be set out. Unfortunately, there was no reply filed by the plaintiff nor were there allegations of express malice. In any case, no evidence was even presented by the plaintiff on express malice. The reference in para 8 of the amended statement of claim to the words that the defendants published the words 'falsely and maliciously' was not a plea of express malice. Such allegations were meant to make out the plaintiff's case. Thus, such words 'falsely and maliciously' as pleaded, did not make out a plea of express malice to negate the defence of qualified privilege.

[26] In *M Prabhkaran v Salam bin Seran* [2001] 6 MLJ 368 headnote [5] it is stated:

Where the plaintiff wished to rely on express malice on the part of the defendant in order to defeat the plea of qualified privilege, he would have to plead to this effect and give particulars of facts and matters from which he alleged the malice was to be inferred and this should have been done by way of reply and not in the statement of claim. It was a mandatory requirement on the part of the plaintiff to have served a reply giving particulars of the facts and matters from which the malice was to be inferred as required under O 44 r 3(3) of the Rules of the High Court 1980 ('the SCR'). However, since the plaintiff had failed to serve a reply pleading express malice as required under O 44 r 3 of the Subordinate Courts Rules, he could not be allowed to rely on express malice without having served the reply to defeat the defence of qualified privilege, as only the reply would have formed part of the pleadings in the civil suit.

[27] In *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3)* [2005] 5 MLJ 561, Abdul Malik Ishak J held at headnote [4] that:

[4]… in a situation where the defendants' plead qualified privilege, the law dictates that the plaintiff must deliver a reply to the defence pleading malice to negate the defence of qualified privilege. There was no reply to the defence and the plaintiff could not plead malice by way of an affidavit. Therefore, the plaintiff has not complied with O 78 r 3(3) of the RHC.

[28] His Lordship went further and at p 583 opined:

> In a nutshell, all these authorities point to this. That the plaintiff's failure to comply with O 78 r 3(3) of the RHC must mean that the defendants' plead qualified privilege stood unassailed. The plaintiff was not in a position to submit that the defendants' plea of qualified privilege was bound to fail.

[29] The onus is on the plaintiff to prove malice. In *Hoe Thean Sun & Anor v Lim Tee Keng* [1999] 3 MLJ 138; [1999] 1 CLJ 187, the court held:

> When words are published which are both false and defamatory the law presumes malice on the part of the person who publishes them. However, when the publication takes place under circumstances which create qualified privilege, the presumption of malice is rebutted by privilege and the plaintiff has to prove express or actual malice on the part of the person responsible for the publication to defeat the privilege.
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> The onus lies on the plaintiff to prove malice and not the defendant to prove his bona fide or absence of malice. When the occasion is privileged, the bona fides of the defendant is always presumed. In the present case, there was no doubt that in law the defendant published the defamatory statements on a privileged occasion.
>
> It was therefore to be assumed that he published it honestly believing his statements to be true unless there was some evidence to the contrary.

[30] In *Kian Lup Construction v HongKong Bank Malaysia Bhd* [2002] 7 MLJ 283; [2002] 7 CLJ 32, the court held:

> It is a question of law as to whether an occasion is a privileged, as the plea is raised in defence. The question whether the occasion on which the statement was made was a privileged one is a question for the judge and the defendant bears the burden of establishing the facts and circumstances necessary to create the privilege. If the judge rules that the occasion is privileged, then the plaintiff must, in order to succeed in the action, prove that the defendant was not using the occasion honestly for the purpose for which the law gave it to him, but was actuated by malice.

[31] In the absence of malice, the defence of qualified privilege therefore applies and the defendants are certainly entitled to rely on the defence.

[32] On the issue of recognition of the university I find that it is only upon being questioned by the court that PW1 says in no uncertain terms that the university is not recognised. What prompted the court to ask this question was because both counsel for the parties has not been able to get from this witness as to the exact status of it but when I pinpoint to this very pertinent question, unhesitatingly this witness says that the university is not recognised. There are of course other evidence in particular the evidence of DW2 and the documents referred by him to indicate that there is something dubious about the status of the Irish International University. In that respect, I tend to agree with the title of the impugned article which says 'Degrees from dubious universities under probe'. There are sufficient facts to support that opinion.

[33] In this respect, the court has done an analysis of the documents referred to by both PW1 and PW2. The first document being the letter at p 52 of the agreed bundle of document in *lampiran* 12. This letter is dated 13 December 1999 and the plaintiff contends that this is a letter of recognition by the government. Next, I will refer to the document at p 89 of the same bundle which is a letter dated 26 April 2005. This letter is from the Jabatan Perkhidmatan Awam addressed to DW2 informing her that the plaintiff is not in the list of universities recognised by the government for purpose of admission to the public service. PW2 in his evidence states that the plaintiff was incorporated on 29 March 2000 and was registered as a foreign company under s 332(1) of the Companies Act 1965 on 14 January 2002. The documents referred to by PW2 are contained in pp 48–51 of the agreed bundle of documents.

[34] In my view the letter dated 13 December 1999 cannot be construed as a letter of recognition by the government. The plaintiff was incorporated in the year 2000, that is 29 March 2000 to be exact and was only registered in this country as a foreign company on 14 January 2002. On 13 December 1999 the plaintiff was not even incorporated yet. Furthermore the said letter was addressed to one, Professor Sandhu, Executive Director, International Postgraduate Facilitator Management Centre, Kuching Sarawak. He is not the plaintiff and neither was it shown what the relationship between him and the plaintiff is. There is more than sufficient evidence to show that the plaintiff is not a recognised university and its status remains dubious. The evidence of PW2 however establishes that the plaintiff is a legal entity being registered as a business entity under s 332(1) of the Companies Act 1965.

[35] I also find what has been stated in the article is not really a comment but rather a presentation of the facts on the subject matter and thus the expression of opinion that the degrees from the plaintiff's university were dubious and the qualifications were questionable is a fair comment on a matter of public

interest. It is a publication of some facts which are supported by evidence, both oral and documentary which is indeed the truth.

[36] In conclusion, the court finds that the defendants have successfully put up a defence of justification and qualified privilege in respect of the article published on 19 July 2005. The plaintiff's claim against the defendants is hereby dismissed with costs in the sum of RM20,000.

Plaintiff's claim dismissed with costs.

Reported by Ashgar Ali Ali Mohamad